



COMMONWEALTH of VIRGINIA

CHESAPEAKE BAY LOCAL ASSISTANCE DEPARTMENT

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James W. Dossett
Director, Code Compliance
County of Spotsylvania
P.O. Box 220
Spotsylvania, Virginia 22553

Dear Mr. Dossett,

Following our meeting on Monday, June 25 attended by you, Ray Utz, Joe Lurch, Stephen Judy, Catherine Harold, and myself, I feel it is appropriate to clarify guidance discussed during the meeting. The issues addressed during this meeting captured Departmental interpretation of policies that comply with the Bay Act and Chesapeake Bay Local Assistance Department Regulations.

The first issue raised regarded the designation of wetlands as a Resource Protection Area (RPA) feature when the wetland is separated from a perennial stream by a natural or man-made levee. The guidance we offered is supported by information found in the Local Assistance Manual (page HI-24), which cites §§ 9VACIO-20-80.B of the Regulations, and states the following:

The designation of resource Protection Areas (RPAs) requires the inclusion of tidal wetlands, as well as nontidal wetlands, which are both contiguous and connected by surface flow to either tidal wetlands or tributary (perennial) streams.

Another source of information is Information Bulletin 6, which includes a definition of "contiguous" from the *Webster's Ninth New Collegiate Dictionary* (established as reference for terms in Virginia regulations) as follows:

1: being in actual contact: touching along a boundary or point, ... 3: next or near in time of sequence; 4: touching or connected throughout in an unbroken sequence.

Furthermore, the U.S. Army Corps of Engineers addresses the issue of adjacency in its Nationwide Permit Regulations published in the November 22, 1991 Federal Register for purposes of determining whether a wetland is considered to be isolated. According to the Corps'

regulations "Adjacent wetlands include those that are separated from the river, stream, or other waterbody by man-made or natural barriers such as dikes, roads, river berms, or beach dunes." This aspect of the Corps' regulations remained in tact after the Supreme Court case *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99-1178 (January 9, 2001) ("SWANCC"), which limited the Corps' jurisdiction over isolated wetlands. In its findings, the Court stated that: "In view of the breadth of federal regulatory authority contemplated by the Act itself .. the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."

For the purposes of considering contiguity, the Department holds that where an Obvious hydrologic connection exists (including groundwater) to an adjacent waterbody and it is located within the 100-foot buffer area of the RPA feature (i.e., which could be adjacent to a tributary stream), then it should be considered contiguous even if it is physically separated by man-made or natural barriers as described in the Corps of Engineers regulations cited above.

Surface flow, as interpreted on page III-24 of the Manual is "actual ground saturation or inundation". The hydrologic connection should be visible for at least seven days of the growing season. In the specific case we spoke of, a wetland body near the shoreline of a river is separated in sections by a natural or man-made levee or berm. In this case there are points where the wetland and water body do make actual contact. It may be necessary, in cases such as this where the point of contact between these features does not take place on the actual site where a development activity is proposed, to go off-site in order to assess the area upstream to make the determination for point of contact.

The second issue raised the question of when a line should be drawn between those nontidal wetlands that must be included within the RPA and other nontidal wetlands. This issue is also addressed in information Bulletin #6, as we pointed out in our discussion. Again, the two criteria of "contiguous" and "connected by surface flow" described above are used to make the RPA determination.

The third issue raised was one relating to the designation and implementation of performance criteria for a perennial stream that has sections that have been piped. The piped sections are, in some cases, covered by pavement and no longer visible. Adjoining sections are not piped or covered. The questions asked were whether these open perennial stream sections should be designated as RPA features and therefore require a 100-foot vegetative RPA buffer. Catherine Harold agreed to research this question in more detail, but did provide guidance to be used until further notice. She suggested that the open sections of the perennial stream should be protected with the 100-foot RPA buffer, just as the entire stream would have been if not piped. The reduction of nutrients and phosphorus entering the waterway is even more important to water quality in the sections open to surface flow of runoff from urban land uses. This water will also eventually enter the Bay and its tributaries. If the open sections of the stream are confined to a concrete lined channel the 100-foot buffer should also be applied, as the buffer function has not changed. One example of a locality that addressed this issue is the City of Alexandria, which does not designate the RPAs adjacent to piped sections of tributary streams, but includes perennial stream segments up and downstream of piped sections as RPA features. Should any

portions of the piped sections of the streams be daylighted in the future, they must be designated as RPA features along both sides of the newly daylighted portions.

Another specific case that we discussed regarded a proposed residential development that has a perennial stream located on the property. The adjacent property that the stream runs through is mapped as an intermittent stream, yet has a volume of flow into the receiving perennial stream that suggests its flow would be perennial. A site-specific delineation of this stream may be necessary in order to insure consistency with the Spotsylvania County's Chesapeake Bay Preservation Area Ordinance, which reads: *field located RPA may be required for any development regulated by this chapter (§ 6A-5 A)*. In some cases, we understand that a landowner will not grant permission to access his property for this purpose. In these instances, it may be necessary to use aerial photography to assess features on the property.

I hope this letter serves as clarification of the issue discussed at our meeting. Please call me with any questions or concerns you have.

Sincerely,



Susan A. Haas

Cc: Catherine Harold, Environmental Engineer; CBLAD,
Martha Little; Chief of Environmental Planning; CBLAD,
Shawn E. Smith, Implementation Review Officer